

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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DAVID WALKER,  
Plaintiff,

vs.

CITY OF OREM, et al.  
Defendants.

MEMORANDUM DECISION AND  
ORDER

Case No. 02-CV-253 TS

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Plaintiff filed Proposed Excerpts from the Testimony of Michael Baden<sup>1</sup> listing portions of a June 4, 2004 deposition of Dr. Baden that Plaintiff intends to present during its case-in-chief. Defendant Clayton filed an Opposition to Plaintiff's proposed use of the excerpts, in which Defendant Peterson joined.<sup>2</sup> Defendants argue that the deposition is inadmissible hearsay under Rules 801 and 802 of the Federal Rules of Evidence.<sup>3</sup> Plaintiff filed an Opposition to Defendant Clayton's Opposition,<sup>4</sup> stating that Defendant Clayton "would not allow Dr. Baden to be called

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<sup>1</sup>Docket No. 390.

<sup>2</sup>Docket No. 399.

<sup>3</sup>Docket No. 398.

<sup>4</sup>Docket No. 406.

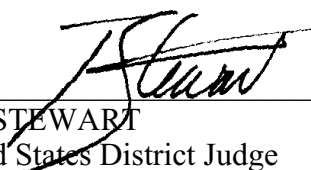
by Plaintiff, even though Dr. Baden would be in Salt Lake City for the trial[.]"<sup>5</sup> Therefore, Plaintiff argues, the witness is "unavailable" to Plaintiff to testify at trial and the excerpts should be admitted under Rule 804 of the Federal Rules of Evidence. Both Defendants list Dr. Baden as a witness to be called at trial.

The Court finds that Dr. Baden's deposition testimony is inadmissible. Rule 804 allows use of the deposition if the witness is unavailable. Regardless of the representations made between parties prior to the commencement of trial, Dr. Baden "will be available in court for examination by all parties[]"<sup>6</sup> on October 17, 2007. Thus, Plaintiff may elect to not rest its case until after Dr. Baden testifies in court as to the subject matter excerpted and referred to in Docket No. 390. It is therefore

ORDERED that Defendant's Opposition to Plaintiff's Proposed Excerpts from the Deposition of Michael Baden (Docket No. 398) is GRANTED.

DATED October 11, 2007.

BY THE COURT:

  
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TED STEWART  
United States District Judge

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<sup>5</sup>*Id.* at 2.

<sup>6</sup>Def. Clayton's Opposition at 2, Docket No. 398.